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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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OCT 30 1995

In the Matter of )  
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Review of the Commission's )  
Regulations Governing Programming )  
Practices of Broadcast Television )  
Networks and Affiliates )  
 )  
47 C.F.R. § 73.658(a), (b), (d), )  
(e) and (g) )

MM Docket No. 95-92

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COMMENTS OF VIACOM INC.

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October 30, 1995

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## SUMMARY OF ARGUMENT

This proceeding constitutes a further reexamination by the Commission of the rules regulating broadcast television network/affiliate relationships in light of changes in the video marketplace. In these Comments, Viacom Inc. ("Viacom") will demonstrate that recent economic and regulatory developments, far from advancing the argument for repeal, support retention of the exclusive affiliation rule and of the dual network rule and retention of the time option rule at least for the established networks.<sup>\*/</sup> These rules should be retained because they restrain the power of the established networks to inhibit the development of new and emerging networks.<sup>\*\*/</sup>

The new United Paramount Network ("UPN") and the Warner Brothers Network ("WBN") were both launched in January of this year. These new networks face formidable challenges in expanding their program schedules and affiliate bases to the point where they provide competition to the established networks and diversity in the national programming market and can strengthen their primarily UHF affiliate base. The exclusive affiliation rule, the time option rule and the dual network rule will help to assure that the established networks take no actions that will inhibit achievement of these goals.

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<sup>\*/</sup>As used herein, "established networks" refers to ABC, CBS, NBC and Fox.

<sup>\*\*/</sup>Viacom also supports retention of the right to reject rule with the clarification proposed by the Commission.

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**COMMENTS OF VIACOM INC.**

Viacom Inc. ("Viacom") respectfully submits these comments in response to the Notice of Proposed Rule Making in the above-captioned matter, released June 15, 1995 (the "Notice").

**I. INTRODUCTION**

In its Notice, the Commission solicits comments on whether several of the rules governing the relationship between broadcast television networks and their affiliates continue to serve the purposes for which they were adopted. Those rules are: (1) the exclusive affiliation rule; (2) the time option rule; (3) the dual network rule; (4) the right to reject rule; and (5) the network territorial exclusivity rule. Most of these rules were adopted almost 50 years ago in order to promote the development of new networks and to ensure that control over television stations

remained with the licensees of those stations, as well as to promote the Commission's more general objectives of maximizing diversity and competition.<sup>1/</sup>

The Commission has long had a policy and goal of fostering the creation of new broadcast networks in order to increase competition with existing networks and the diversity of programming choices available to the public.<sup>2/</sup> This goal is finally on the way to realization, with the emergence and growth of the Fox Network over the past decade and with the emergence earlier this year of two new networks, one of which is UPN.<sup>3/</sup> In order to insure that the emerging networks have an opportunity to continue their development and establish long-term affiliate relationships, Viacom supports retention of the first four rules; it takes no position with respect to the network territorial exclusivity rule. Specifically, in order to encourage the continued development of new networks, the Commission should retain the exclusive affiliation and dual network rules as well as the time option rule,

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<sup>1/</sup>Though adopted to promote competition between stations for viewers and advertisers and to promote program diversity, the network territorial exclusivity rule, because it does not affect the capacity of emerging networks to secure outlets for their programming, is of less importance than the others to the development of new networks.

<sup>2/</sup>See, e.g., Competition and Responsibility in Network Television Broadcasting, 25 F.C.C.2d 318, 333 (1970) ("Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of this Commission.").

<sup>3/</sup>Viacom, through subsidiaries, is one of the program suppliers to UPN and has a contingent ownership interest in the new network. Viacom's subsidiary, Paramount Pictures Corporation, provided certain of the initial funding, personnel, and infrastructure to UPN, and its subsidiary has an option to purchase 50% of the equity of UPN, all of which is currently held by subsidiaries of Chris-Craft Industries, Inc.

at least for the established networks.<sup>4/</sup> In addition, Viacom believes that the Commission should retain the right to reject rule with the suggested clarification that an affiliate may enter into contracts that prevent it from rejecting network programming for purely economic reasons.

**II. THE COMMISSION SHOULD NOT FURTHER INCREASE THE LEVERAGE THAT RECENT REGULATORY AND ECONOMIC CHANGES HAVE GIVEN THE ESTABLISHED NETWORKS OVER THEIR AFFILIATES BY REPEALING THE EXCLUSIVE AFFILIATION, TIME OPTION AND DUAL NETWORK RULES**

The Commission's proposal to repeal the exclusive affiliation, time option and dual network rules could not come at a worse time for the emerging networks. Specifically, a number of developments, both regulatory and economic, are currently causing consolidation of the dominant position of the established networks over their affiliates. Repeal of these rules will further enhance the influence of networks over the programming decisions of their affiliates and consequently could stunt the efforts of the emerging networks to compete for the audiences and affiliates they need to succeed through secondary affiliations or otherwise.

**a. Recent Economic Developments**

Some of the recent economic developments affecting the relationships between the established networks and their affiliates are:

- The established networks are further aligning network and affiliate economic interests by making equity investments in their affiliates. The influence a network obtains over its affiliates by investing in and

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<sup>4/</sup>As used herein, "established networks" refers to ABC, CBS, NBC and Fox.

participating in management decisions of the affiliates obviously results in fewer opportunities for the emerging networks to partner with the affiliates. The heated competition among the networks for VHF affiliates was set in motion in May 1994 when Fox bought a 20% equity interest in New World Communications Group for \$500 million and entered into a ten-year affiliation agreement with New World covering its 12 stations.<sup>5/</sup> Fox also bought equity interests in SF Broadcasting, which acquired four major market affiliates that switched to Fox, and Blackstar Acquisition, which plans to buy VHF stations in markets 50-100 and make them Fox affiliates.<sup>6/</sup> ABC and CBS have also begun acquiring equity interests in station groups as a means of securing affiliates and possibly increased network programming clearances for the long term. ABC recently acquired an equity interest in Young Broadcasting, and Young's five ABC affiliates renewed their affiliations for ten-year terms.<sup>7/</sup> In July 1994, prior to Westinghouse's proposed acquisition of CBS, CBS formed a venture with Westinghouse to acquire

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<sup>5/</sup>See, e.g., Foisie, Fox and the New World Order, Broadcasting & Cable, May 30, 1994, at 6; Stern, Small Investments Yield Big Benefits -- Networks Use Minority Interest in Stations to Lock in Affiliations, Broadcasting & Cable, Oct. 17, 1994, at 26.

<sup>6/</sup>See, e.g., Stern, supra at 28; Communications Daily, Oct. 11, 1994, at 2.

<sup>7/</sup>Stern, supra, at 28; Flint, ABC has Young Affiliates, Variety, Oct. 9, 1994, at 168.

stations and secure them as CBS affiliates. In addition, Westinghouse's existing stations were secured as CBS affiliates for ten years.<sup>8/</sup>

- The established networks have begun to bind their affiliates to long-term affiliation agreements either through straightforward contractual agreements or by securing an ownership interest in the affiliate. During the past year, the networks have been strengthening their hold on affiliates by lengthening and sweetening the terms of network-affiliate contracts, even with stations and station groups in which they have no ownership interest.<sup>9/</sup> In fact, ABC, CBS and NBC have already tried to buy affiliate loyalty by paying \$250 million in affiliate compensation in 1994, almost double what they paid the previous year.<sup>10/</sup>

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<sup>8/</sup>See Stern, supra, at 28; Zier, CBS, Group W Form Historic Alliance, Broadcasting & Cable, July 18, 1994, at 14.

<sup>9/</sup>See, e.g., Communications Daily, Nov. 22, 1994, at 2 (Providence Journal and NBC sign 7-10 year affiliation agreements with Boise, Charlotte, Portland and Seattle stations); Zier and Ellis, Buying New Vision's TVs for \$230 Million, Broadcasting & Cable, Nov. 21, 1994, at 6 (New Vision signs 10-year affiliation agreements with NBC and CBS); West & McClellan, Running With the Wind, Broadcasting & Cable, Oct. 31, 1994, at 30 (all of ABC's recent affiliation agreements are for 10-year terms); McClellan, Keeping Up with the Affiliates, Broadcasting & Cable, Aug. 1, 1994, at 11 (NBC announces 7 long-term affiliation agreements); Foisie, ABC Preempts CBS in Cleveland, Detroit, Broadcasting & Cable, June 20, 1994, at 7 (Scripps Howard signs 10-year affiliation agreements with ABC in 5 markets).

<sup>10/</sup>Farhi, The TV Violence that Isn't on the Tube -- CBS, NBC and ABC in Bitter Sparring Match with Fox over Affiliates, Washington Post, Nov. 23, 1994, at C4; McClellan, NBC Still Considering Offers, Wright Says, Broadcasting & Cable, Oct. 24, 1994, at 20; West & McClellan, Running With the Wind, Broadcasting & Cable, Oct. 31, 1994, at 30, 31.

- Network concern over affiliate defections to competitors, which has given rise to many of the new business arrangements, will provide strong incentives to buy affiliate loyalty with preferential treatment in the distribution of both independently produced and in-house produced syndicated programming.<sup>11/</sup> This network-originated programming will occupy scarce broadcast time at the expense of emerging networks, particularly those securing secondary affiliations where primary affiliations are unavailable.

These recent economic changes will bind affiliates more closely to their networks, give networks more control over their affiliates' decisions with respect to making program time available to emerging competitors to the established networks and give the networks an even greater economic interest in and, consequently, more management influence over the decisions of their affiliates than they had until now. They will also (particularly in conjunction with the regulatory changes discussed below) preclude the emerging networks, as they develop a full slate of competitive prime time programming, from competing with the established networks for primary affiliations, as Fox was able to do.

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<sup>11/</sup>See Ginsberg, Independent TV Firms Shudder as Networks Hike In-House Production, Los Angeles Bus. J., July 19, 1993, at 40; Tyrer, Producers Scorecard: Winning Isn't Everything, Electronic Media, June 7, 1993 (noting that a tight economy and changing regulatory environment had pushed the networks to become their own leading suppliers of programming and describing the effects of this development on independent producers); Coe, Networks Are Their Own Best Customers, Broadcasting & Cable, May 30, 1994, at 21 (noting that for the first time in history, the big three network in-house production divisions are the major suppliers to their respective network schedules).

**b. Recent Regulatory Developments**

**i. Regulatory Changes**

In addition to changing markets, a number of recent reexaminations and repeals of Commission rules threaten further to increase the leverage of the established networks over their affiliates. As stated, as the established networks increase their program production activities and, with the recent repeal of the remaining syndication rules, enter the first run and off-network syndication business, their programming leverage over their affiliates is likely to extend from network programming to syndicated programming. This leverage will enable the established networks to control more and more local station broadcast time, all at the expense of the affiliates' capacity to enter into secondary affiliations with emerging networks.<sup>12/</sup> The recent repeal of the Prime Time Access Rule only exacerbates these problems. For example, with PTAR's elimination, the established networks will be able to expand network hours on their affiliates to fill all the prime time hours. In addition, the repeal of PTAR together with repeal of the financial interest and syndication rules will adversely affect the economics of independent stations, which comprise the bulk of the emerging networks' affiliates. Independents will be at a great disadvantage vis-a-vis network owned and affiliated stations in acquiring the popular off-network and first-run syndicated programs upon which these stations depend to attract early prime time audiences. These programs, which are a major source of revenue to independents and provide lead-in audiences to emerging

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<sup>12/</sup>See Reply Comments of Viacom Inc. in MM Docket No. 91-221 at 4-5.

network programming, will be purchased by affiliates of the established networks, which can better afford to pay top dollar for such programs.<sup>13/</sup> Repeal of the exclusive affiliation and time option rules would enhance the leverage of the established networks even more, making competition with them by emerging networks a virtual impossibility.

**ii. Regulatory Proposals**

If the Commission or Congress relaxes the television multiple ownership rules as proposed, it is likely that the established networks will purchase a number of their strongest affiliates as well as other available stations, thereby eliminating these stations as potential primary or secondary affiliates for emerging networks.<sup>14/</sup> If the Commission were also to eliminate the exclusive affiliation and the time option rules, the number of stations with which emerging networks could affiliate, even secondarily, would be reduced even further. Moreover, repeal of the dual network rule would enable the established networks to affiliate their newly developed second networks with the few remaining independents, thus impairing even further the affiliate base an emerging network requires for successful operation. The mere ability of the established networks to threaten to purchase additional stations and move an affiliation to a newly acquired owned and operated station in a market increases the leverage the established networks can exercise over their current affiliates to ensure

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<sup>13/</sup>See Comments of Viacom Inc. in MM Docket 94-123 at 35-36, 44.

<sup>14/</sup>See Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making in MM Docket No. 91-221 (Jan. 17, 1995).

that the affiliates "behave" and abide by network interests by clearing more network programming (thereby limiting clearances for emerging networks) and by refraining from becoming secondary affiliates of emerging networks.

Finally, the Commission's recent proposal to eliminate the network advertising representation rule would further allow the established networks to sell non-network advertising time for their affiliates, thereby increasing even more the influence the networks (in the guise of the station's advertising representative) will be able to exert over their affiliates as the network involves itself directly in recommending and influencing the programming purchases and decisions of the affiliate in every day part, even those beyond the periods normally programmed by the network.<sup>15/</sup>

If the new networks are ever to become truly competitive with the established networks, they will have to expand their program offerings and their number of affiliates so that their reach is comparable with that of the established networks. To achieve these goals, it is likely that, in markets where they have either no affiliate or only a secondary affiliate, the new networks will, at least until they develop program schedules competitive with those of the established networks, need to rely on secondary affiliations to obtain at least some limited exposure in markets where primary affiliations are not currently available.

The Section of these Comments that follows sets forth briefly how repeal of each of the exclusive affiliation rule, the time option rule, and the dual network rule

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<sup>15/</sup>Review of the Commission's Regulations Governing Broadcast Television Advertising, Notice of Proposed Rule Making in MM Docket No. 95-90 (June 14, 1995).

would operate in the economic and regulatory environment discussed so as to impair the ability of the emerging networks to develop into successful operations.

**III. THE COMMISSION SHOULD REJECT ANY ACTION THAT WOULD INHIBIT THE DEVELOPMENT OF EMERGING NETWORKS**

**a. The Commission Should Retain The Exclusive Affiliation Rule**

Repeal of the exclusive affiliation rule would inhibit the development of new networks. Specifically, without this rule, the established networks could prevent their affiliates from establishing secondary affiliations with emerging networks. As the Commission recognized in its Notice, this ability could make it difficult for new networks to line up stations to air their programming. In markets where all the existing stations are already primarily affiliated with an established network, new networks would have no outlet for their programming if the rule were to be repealed. Indeed, UPN has faced and will continue to face this very problem. The fact that the rule existed was instrumental in defining the accepted parameters of network influence and pressure and thereby facilitating UPN's capacity to secure its necessary secondary affiliates.

The importance to the emerging networks of the ability to secure and maintain secondary affiliations in markets with four or fewer stations until additional stations begin to broadcast is demonstrated by UPN's affiliate lineup. While currently approximately 19% of UPN's 89% national coverage of television households is achieved through secondary affiliations using out-of-pattern clearances, 78 primary affiliates provide the primary coverage and 66 affiliates provide the secondary

coverage. The large number of secondary affiliates relative to the percentage of national coverage they provide shows how essential secondary affiliations are to emerging networks in providing service to smaller markets, most of which do not have five television stations, that are needed to attain national coverage.

**b. The Commission Should Retain The Time Option Rule  
For The Established Networks**

Repeal of the time option rule for the established networks would permit them to retain an option on certain hours of affiliate stations' time, which they could use to inhibit the development and growth of emerging networks. Specifically, an established network could option time on its affiliates that would otherwise be available for programming from an emerging network. If an established network's affiliates entered into secondary affiliations with emerging networks, the established network could nevertheless exercise its option on the hours that its primary affiliates use for programming of emerging networks and on other highly desirable time slots, thereby limiting a potential competitor's access to viewers. Whether or not a network would actually ever exercise the option is immaterial. The threat of losing broadcast outlets would inhibit an emerging network from spending the resources required to develop programming which could simply be permanently preempted through the established network's exercise of its time option.

While the time option rule should be retained for established networks, a limited repeal of that rule for emerging networks could prove helpful to the development of those networks. It is likely that an emerging network will be able to expand its program hours only after developing a consensus between the network

and most of its affiliates concerning the desirability of adding more programs. The ability to engage in time optioning could assist emerging networks in doing so by permitting them to enter contractual commitments with their affiliates that would allow them to develop programming with the assurance that a block of available time exists for the programming on a sufficient number of stations, while retaining the ability to opt out of the time slot if the program fails to work out as expected. If the Commission permits option time in these limited circumstances, Viacom suggests that a six-month notice period for exercise of any option represents a proper balancing of the interest of a new network in assuring a place for its programming on a group of stations and of those stations in planning their programming schedules.

**c. The Commission Should Retain the Dual Network Rule**

Repeal of the dual network rule would allow the established networks -- if only to preempt the field and preclude competition -- to create and operate a second network and to affiliate this network with independent stations, thereby reducing the number of stations available to affiliate with emerging networks not owned by established networks. Though the Commission notes that dual networking could allow the realization of economies of scale for networks and affiliates, networks can already develop a second program distribution stream by creating cable programming networks. Three of the four established networks already utilize these economies of scale to operate cable networks. For example, ABC owns ESPN and ESPN2; NBC owns CNBC and America's Talking; and Fox owns FX. The established networks were able to use their positions as major broadcast program suppliers to

negotiate for cable carriage of three of these networks, ESPN2, America's Talking and FX, as part of the cable retransmission consent negotiations in 1993. Once the Disney/ABC merger is completed, ABC will also be affiliated with the Disney Channel, and when the Westinghouse/CBS transaction is completed, CBS will be aligned with the Country Music Television network, in which Westinghouse owns a substantial minority interest. In the current analog environment of broadcast channel scarcity, the established networks should not be permitted to undermine the competition and diversity goals that have been the basis of the long-standing Commission policy of encouraging the development of additional independently owned and operated broadcast networks.<sup>16/</sup>

When broadcasters begin to use multiple channels in a digital broadcasting environment, concerns about the ability of emerging networks to obtain outlets for their programming may be diminished. Accordingly, the issue of whether the dual network rule should be retained after broadcasters convert to operation in the digital

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<sup>16/</sup>The problem of a shrinking affiliate base for emerging networks also could be exacerbated by the Commission's contemplated elimination of other broadcast rules. For example, as demonstrated in Viacom's Reply Comments in the Commission's proceeding examining the regulations governing television broadcasting, the Commission's contemplated elimination or relaxation of the television duopoly rule would allow established networks to acquire an ownership interest in or enter into an LMA with a second station in a market and prevent that station from affiliating with an emerging network. Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making in MM Docket No. 91-221 (Jan. 17, 1995). Viacom showed that even if an LMA managed by a network was uneconomical and detrimental to the LMAed station, it could be in the overall interests of the established network to stem the emerging network's potential as a competitor and enter into an LMA arrangement if only to preclude access to a market by an emerging network. See Reply Comments of Viacom Inc. in MM Docket No. 91-221 at 2-3.

mode should be addressed in the advanced television (ATV) proceeding, where the issue has already been raised. As long as broadcasters continue to operate using analog channels, however, the dual network rule should be retained.

#### **IV. THE COMMISSION SHOULD RETAIN THE RIGHT TO REJECT RULE**

The Commission proposes "to retain the right to reject rule but to clarify that the rule may not be invoked based solely on financial considerations."<sup>17/</sup> Currently, the rule permits affiliates to reject network programs that they reasonably believe are unsatisfactory or unsuitable or contrary to the public interest or to substitute a program that the affiliate believes to be of greater local or national importance. 47 C.F.R. § 73.658(e). Accordingly, even as written, the rule contemplates that exercise of the right of rejection of programming will be based on something more than profitability. Nevertheless, if the Commission believes that the rule needs clarification, Viacom supports the Commission's proposal. As the parties responsible for operating stations in compliance with the Communications Act and Commission rules, licensees need to retain control of programming content in order to fulfill their obligation to exercise judgment in deciding whether the broadcast of a program is in the public interest. Network affiliates, however, should not be permitted to abuse this right by rejecting programming solely because the station could earn higher profits by airing another program. Such an ability would merely jeopardize the production of innovative programming that lacked a proven record. The rule, as the Commission proposes to clarify it, represents a fair accommodation of the interests of

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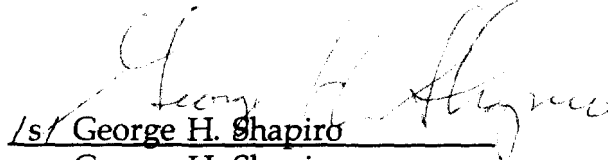
<sup>17/</sup>NPRM at 13.


affiliate licensees in maintaining control over programming aired on their stations and of networks in having their programming cleared by their affiliates. Viacom therefore urges the Commission to retain and clarify it as proposed.

## V. CONCLUSION

For the foregoing reasons, Viacom urges the Commission to retain the exclusive affiliation and dual network rules and the time option rule, at least for the established networks. In addition, Viacom supports the Commission's suggested clarification of the right to reject rule indicating that affiliates may not reject programming solely for economic purposes if the Commission thinks that such a clarification is necessary.

Respectfully submitted,

  
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